

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA L. MAINZINGER,

Plaintiff-Appellant/Cross-Appellee,

v

RIVERVIEW COMMUNITY SCHOOL
DISTRICT, ROGER K. ALLEN and PAUL
REEVES,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED
February 11, 2003

No. 233775
Wayne Circuit Court
LC No. 99-914476-CZ

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition of her defamation and injurious falsehood claims pursuant to MCR 2.116(C)(7) and (C)(10) in favor of defendants. Defendants claim on cross-appeal that the trial court's order denying their summary disposition motion pursuant to MCR 2.116(C)(4) was improper. We affirm.

Plaintiff began working as a full-time probationary teacher for the Riverview Community School District in the fall of 1995. Plaintiff received a satisfactory performance evaluation during the 1995-96, 1996-97, and 1997-98 school years. Defendant Paul Reeves became the principal in 1996 and evaluated plaintiff's performance during the 1998-99 school year. Plaintiff's December 1998 evaluation indicated that she needed improvement in classroom management, instructional techniques, evaluation techniques, personal qualities and attitudes, and relations with administration. Reeves evaluated plaintiff again in March 1999, and she received an "unsatisfactory" rating, which indicated "deficiencies significant enough for the Board of Education to either place [the teacher] on corrective status . . . or recommend dismissal." Thereafter, Reeves recommended that plaintiff's teaching contract be terminated.

Defendant Roger Allen, the superintendent of the school district, supported Reeves' recommendation and advised the Board of Education as such. The Board of Education voted to terminate plaintiff's teaching contract. Her termination became effective on June 11, 1999, the last day of the 1998-99 school year. Plaintiff vigorously denied the truthfulness of the statements in her evaluations and claimed that defendants knowingly made false statements about her teaching performance in the evaluations and to the school board.

Plaintiff instituted this suit against defendants Allen and Reeves alleging defamation and injurious falsehood (counts II and IV).¹ The trial court granted summary disposition of plaintiff's claims in favor of defendants. With respect to Allen, the trial court granted summary disposition pursuant to MCR 2.116(C)(7), finding that he was acting under the scope of his executive authority and was absolutely immune from suit. With respect to Reeves, the trial court granted summary disposition pursuant to MCR 2.116(C)(10), finding that plaintiff failed to establish that Reeves made the statements with falsity or in reckless disregard of the truth.

I. Plaintiff's Claims Against Defendant Allen

We review a trial court's grant or denial of a motion for summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion brought under MCR 2.116(C)(7) we must consider all affidavits, depositions, admissions or other documentary evidence submitted by the parties. MCR 2.116(G)(5). The court must accept the plaintiff's allegations as true unless specifically contradicted by the documentation submitted. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1995).

Plaintiff first erroneously argues that Allen did not preserve the defense of absolute immunity because he did not timely raise the defense below. Individual governmental immunity is an affirmative defense. *Berlin v Superintendent of Public Instruction*, 181 Mich App 154, 159; 448 NW2d 764 (1989). See also MCR 2.111(F)(3)(a) (immunity granted by law is an affirmative defense). An affirmative defense must be stated in a party's responsive pleading, "*either as originally filed or as amended* in accordance with MCR 2.118." MCR 2.111(F)(3) (emphasis added). Although Allen failed to initially plead absolute immunity as an affirmative defense, the trial court allowed him to amend his answer in which he asserted the defense.² Therefore, the defense was preserved and could be the basis of the trial court's summary disposition ruling.

Plaintiff next argues that summary disposition of her claims against Allen was improper on the basis that Allen was absolutely immune from tort liability. Plaintiff contends that a superintendent is not protected by the absolute immunity afforded executive officials pursuant to MCL 691.1407(5). We disagree.

Governmental immunity absolutely bars tort claims against judges, legislators, and the elective or highest appointed executive officials of all levels of government whenever they are acting within the scope of their judicial, legislative, or executive authority. MCL 691.1407(5).³ Because Allen was the school superintendent, the highest executive official of the school district, a level of government, he is entitled to absolute immunity so long as he was acting in the scope

¹ Counts I and III of plaintiff's four-count complaint were dismissed by the trial court pursuant to an order entered on January 5, 2000. The disposition of these counts is not challenged on appeal.

² Plaintiff does not challenge the trial court's decision to allow plaintiff and defendants an opportunity to amend their pleadings. In fact, plaintiff does not acknowledge these amendments.

³ Defamation and injurious falsehood are actions based in tort. *Kollenberg v Ramirez*, 127 Mich App 345, 353; 339 NW2d 176 (1983).

of his executive authority. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 589-591; 525 NW2d 897 (1994), *aff'd* as to result only 450 Mich 934 (1995).⁴

In determining whether particular acts are within an official's executive authority, we consider several factors, including, but not limited to, "the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *American Transmissions, Inc v Attorney General*, 454 Mich 135, 139; 560 NW2d 50 (1997). We find no genuine issue of material fact as to whether Allen's conduct fell within the scope of his authority. The school district has the power and authority to hire and terminate employees, which is vested in the school board. MCL 380.11a. By virtue of his executive authority, granted to him by the school board, Allen owed a duty to make recommendations concerning the continued employment of teachers. Thus, recommending plaintiff's termination for unsatisfactory performance to the school board was clearly within the scope of his executive authority. Accordingly, as a matter of law, plaintiff's claims against Allen are barred by absolute immunity. *American Transmissions, supra* at 144.

We also find that Allen's communications to the school board regarding plaintiff's teaching performance were absolutely privileged. "Communications deemed absolutely privileged are not actionable, even when spoken with malice." *Kefgen, supra* at 618. The doctrine of absolute privilege has been extended to apply to "communications made by a public official in furtherance of an official duty during proceedings of subordinate legislative and quasi-legislative bodies." *Id.* "A duly convened meeting of a school board may constitute a proceeding of a quasi-legislative body that allows for application of the absolute privilege doctrine." *Id.* at 619.

Allen's statements, concerning the evaluative process and plaintiff's performance evaluations, were pertinent to the subject being properly considered by the board. Because Allen made the allegedly defamatory statements to the school board members at a Board of Education meeting during the process of determining whether to terminate plaintiff's teaching contract, exercising his official duties, his statements were absolutely privileged. *Id.* at 620-621. Accordingly, the trial court properly summarily dismissed plaintiff's claims against Allen on the basis that he was immune from suit.⁵

⁴ Although the Supreme Court indicated that its decision "should not be construed as indicating our agreement with the reasoning set forth in the Court of Appeals opinion," it did not specify to which portion of the Court of Appeals' reasoning it was referring, nor did it overrule the Court of Appeals' interpretation of MCL 691.1407(5). Therefore, the Court of Appeals' decision is still binding precedent. *Mitchell v General Motors Acceptance Corp*, 176 Mich App 23, 24; 439 NW2d 261 (1989).

⁵ Having concluded that plaintiff's claims against Allen are barred, we decline to address plaintiff's remaining unpreserved argument regarding whether there exists a factual dispute that he intentionally lied about plaintiff.

II. Plaintiff's Claims Against Defendant Reeves

Plaintiff argues that summary disposition of her defamation and injurious falsehood claims against Reeves pursuant to MCR 2.116(C)(10) was improper because there exists genuine issues of material fact regarding the requisite level of malice. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337. We must consider all documentary evidence submitted in the light most favorable to the nonmoving party in order to decide if a genuine issue of material fact exists. *Kefgen, supra* at 616. "All reasonable inferences are resolved in the nonmoving party's favor." *Id.* Additionally, in regards to plaintiff's defamation claim, we must "make an independent examination of the record to ensure against forbidden intrusions into the field of free expression. *Id.* at 617.

Generally, to establish a claim of defamation a plaintiff must show:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Id.*, quoting *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999).]

However, plaintiff concedes that Reeves' statements are subject to a qualified privilege. Therefore, plaintiff must show that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 79; 480 NW2d 297 (1991).

Reckless disregard for the truth is

not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. 'Reckless disregard' is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Kefgen, supra* at 624 (internal citations omitted).]

"Whether evidence is sufficient to support a finding of actual malice is a question of law." *Id.* at 624-625. "General allegations that privileged statements were false and malicious are insufficient to create a genuine issue of fact regarding whether a person published a statement with actual malice." *Id.* at 624. "In considering a motion for summary disposition, a court must consider whether the evidence is sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Id.* at 625 (citations omitted). Clear and convincing evidence is defined as

evidence that produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id.* (citations omitted).]

To prove malice, plaintiff relied on her deposition testimony that Reeves lied about what he observed during his evaluation of her classroom and thus, she alleged, he knowingly made false statements. Plaintiff testified that almost every statement that Reeves made in her evaluation was false. However, our review of the record indicates that plaintiff presented no evidence that Reeves fabricated the statements. In addition, there is nothing in the evidentiary record, independent of plaintiff's assertions that Reeves lied, to support a finding of malice. In fact, the evidence points to the contrary.

Reeves filed an affidavit stating that he made his recommendations in good faith and based upon his observations and professional judgment of the quality of plaintiff's services. He also stated that he had no malice toward plaintiff or any reason to give a less than truthful evaluation of her teaching performance. In her deposition testimony, plaintiff indicated, in several instances, that Reeves' observations were, at least, substantially accurate, but were perceived differently by plaintiff and defendant Reeves.⁶ Furthermore, another evaluator noted that plaintiff failed to cooperate with other teachers, a criticism shared by Reeves.

Several persons expressed positive opinions regarding plaintiff's teaching ability, but none of these individuals formally observed plaintiff in the classroom. The fact that their opinions contrasted with Reeves' does not support a finding of malice. Also, while the videotaped observation of plaintiff's classroom on March 11, 1999, contradicted some of Reeves' negative statements in his March 12, 1999 evaluation, many of his comments regarding student management referred to Reeves' observation of plaintiff's classroom on March 11, 1999. Further, the videotape supported some of Reeves' statements.

Therefore, we do not find that plaintiff has established a showing of malice by clear and convincing evidence. Because plaintiff did not present sufficient evidence to establish a factual issue whether Reeves acted with malice, she did not overcome the qualified privilege shielding his statements. *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991).

⁶ For instance, plaintiff stated that (1) she did not implement all parts of the discipline plan due to the time constraints in place, (2) it was very likely that there were times throughout the lesson when Reeves observed students speaking out of turn without discipline, (3) the students were not silent one hundred percent of the time, (4) she did not have a student walk up to the board and write his name on the board in accordance with her discipline plan, (5) many students were not writing notes, and (6) some students did not write down any information. Reeves' conclusions were not contrary to these observations.

Injurious falsehood is a claim of “some interference with an economically advantageous relationship which results in pecuniary loss” *Kollenberg v Ramirez*, 127 Mich App 345, 350-351; 339 NW2d 176 (1983).

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interest of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity. [*Id.* at 352, quoting 3 Restatement Torts, 2d § 623A, p 334.]

In this case, it is undisputed that Reeves reported plaintiff’s performance to the Personnel Committee of the school board with the intention of terminating plaintiff. He, in fact, recommended her termination, thereby satisfying the first element of injurious falsehood. However, plaintiff’s claim of injurious falsehood may not be sustained because the second element requires proof of actual malice, *New Franklin, supra* at 222, which, as discussed above, plaintiff has not established. Accordingly, the trial court did not err in summarily dismissing plaintiff’s claims against Reeves.⁷

III. Defendants’ Claim on Cross-Appeal

On cross-appeal, defendants contend that the trial court erred in denying their motion for summary disposition pursuant to MCR 2.116(C)(4) because they were subject to the exclusive remedy provided for in the collective bargaining agreement. We disagree and find that plaintiff’s claims of defamation and injurious falsehood do not involve a violation of her rights created under the collective bargaining agreement, and thus, were not subject to the grievance procedure contained therein.

Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust his administrative remedies. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). “When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and the proofs show that there was no genuine issue of material fact.” *Sun Communities v Leroy Twp*, 241 Mich App 665, 668; 617 NW2d 42 (2000).

Generally, “an employee may not maintain an action against his employer for breach of a collective bargaining agreement unless he has exhausted his contractual grievance procedures.” *Sankar v Detroit Bd of Ed*, 160 Mich App 470, 474; 409 NW2d 213 (1987). However, this rule is only applicable when an employee alleges a violation of his rights created under the labor contract. *Id.* at 475. Therefore, we must determine the nature of plaintiff’s claims, whether they

⁷ Having concluded that Reeves’ statements are protected by a qualified privilege and summary disposition was appropriate, we decline to address plaintiff’s remaining arguments; (1) whether she stated a cause of action for defamation and injurious falsehood and (2) whether Reeves is entitled to governmental immunity.

are based on a breach of contract or sound in tort. *Id.* at 476. In making such a determination, we must “look beyond the face of a plaintiff’s pleadings.” *Id.*

Plaintiff’s claims of defamation and injurious falsehood stem from her allegations that defendants intentionally made false statements about her performance. Pursuant to the collective bargaining agreement, the school district was contractually obligated to evaluate plaintiff in accordance with various procedural requirements as well as to evaluate her performance in good faith. Pursuant to the collective bargaining agreement at issue, a teacher must exhaust the grievance procedure for alleged violations of the Agreement.⁸ However, we conclude that plaintiff’s claims for defamation and injurious falsehood do not involve a violation of her rights under the collective bargaining agreement.

The substance of plaintiff’s claims of defamation and injurious falsehood is that Reeves intentionally made false statements about her teaching performance in his evaluations, and that Reeves and Allen made false and defamatory statements about her performance to the school board at one of their meetings. In order to recover in tort, the duty must exist independent from the duties under the contract. *Ferrett v General Motors Corp*, 438 Mich 235, 240; 475 NW2d 243 (1991). We find that, in this case, plaintiff’s claims, although involving harms related to the evaluation process, are tortious in nature. They relate to a general duty of reasonable care in one’s behavior, in this case, a general duty not to defame, which is independent of (and albeit in addition to) defendants’ duty under the collective bargaining agreement to evaluate plaintiff “fairly and in good faith.” Plaintiff is not simply alleging that defendants failed to perform a contractual promise. Plaintiff refers to sections of the collective bargaining agreement to illustrate that defendants’ statements to the school board were untrue, not to contend that defendants violated the agreement.⁹

Also, we do not agree with defendants that the alleged defamatory statements would not have occurred but for the existence of the agreement’s requirement of formal evaluation. Defendants sought to terminate plaintiff’s teaching contract due to her unsatisfactory performance. It is quite likely that similar statements would have been expressed regardless of the existence of a requirement to formally evaluate plaintiff, although the arena of publication might have changed.

⁸ The collective bargaining agreement provides, in pertinent part,

A grievance is defined to be a complaint by...any teacher based on the belief that there has been a violation, misinterpretation, or misapplication of any provision of this Agreement. The grievance and arbitration procedure shall not be applicable to the disposition in placing a probationary teacher on tenure...or to remedy a complaint where the matter complained of is not covered by this Agreement.

⁹ *Sankar, supra*, is distinguishable from this case because the plaintiff alleged that the defendants negligently evaluated her, in violation of the collective bargaining agreement. The gravamen of her complaint was that she disagreed with the defendants’ performance rating of her. *Id.* at 477. In contrast, in this case, plaintiff contends more than a mere disagreement with defendants’ statements. Plaintiff alleges that defendants knowingly published false statements regarding her performance.

Therefore, plaintiff's claims were not subject to the agreement's grievance procedure and were properly before the circuit court. Accordingly, summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(4) is not appropriate. Although the trial court denied defendants' MCR 2.116(C)(4) motion on the basis that defendants were estopped from raising a defense of lack of subject matter jurisdiction, we will affirm a decision of the trial court that reaches the correct result. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette